In The

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-944

JON ALAN FREY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit

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INDEX

Citations

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To The United States Court of Appeals
For the Fifth Circuit

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Jon Alan Frey, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on October 13, 1977.

CITATIONS TO OPINIONS BELOW

The memorandum opinion and the supplemental memorandum opinion of the United States District

Court were unreported and are printed in Appendix B hereto, *infra*, p. B-11 and p. B-16, respectively. The opinion of the Fifth Circuit Court of Appeals, printed in Appendix B hereto, *infra*, p. B-1, is reported in 558 F.2d 270.

JURISDICTION

The opinion of the Circuit Court of Appeals was rendered on August 29, 1977. (Appendix B, *infra*, B-1). Rehearing was denied on October 5, 1977. Judgement was entered on October 13, 1977. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether, in repeal of 26 U.S.C., Section 4741, the express saving clause of the Drug Control Act (§1103) was intended by Congress to be to the exclusion of 1 U.S.C. Section 109 (the general saving clause), thus precluding the government from collecting taxes alleged to be due by assessment made prior to effective date of repeal.

STATUTES INVOLVED

The statutory provisions involved are 26 U.S.C., Section 4741; Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L. 91-513, 84 Stat. 1236: Sec. 1103; and 1 U.S.C., Section 109. They are printed in Appendix A, *infra*, pp. A-1 — A-2.

STATEMENT OF THE CASE

This suit was initiated by taxpayer Jon Alan Frey on June 21, 1972 as a suit under 26 U.S.C. §1346(a)(1) for a $1,516.40 tax refund for taxes assessed against him

under 26 U.S.C. §4741 of the Marihuana Tax Act. Taxpayer, among other grounds, asserted his right to recovery based upon his claim that the repeal of the Marihuana Tax Act by the Drug Control Act extinguished the previously assessed tax as evidenced by the express savings clause not having included within its terms a provision for preserving such tax liability. The government denied liability and counterclaimed for additional unpaid taxes in the amount of $19,383.60.

The district court granted taxpayer's motion for summary judgment on the government's counterclaim and taxpayer consented to a dismissal with prejudice to his claim for refund. The district court's memorandum opinion was issued April 2, 1976, and, upon the government's subsequent motion to vacate and reconsider the motion for summary jugment, a supplemental memorandum opinion together with the judgment was entered on May 15, 1975. The government appealed to the Fifth Circuit Court of Appeals.

On appeal, the government argued that the express savings clause, which provided that prosecution for any violation of law prior to the effective date of the repeal should not be affected or abated by the repeal, impliedly contemplated that liability for the tax was not to be affected because the specific savings clause would include, among other prosecutions, those for failing to pay marihuana taxes. Thus, argued the government, to construe the legislature's intent otherwise would create an absurdity. Taxpayer urged application of the maxim of statutory construction

that the expression of one thing excludes others not expressed citing *Territory of Alaska v. American Can Co.*, 246 F.2d 493, 17 Alaska 280 (9th Cir. 1957) *reversed*, 358 U.S. 224.

The court below reversed the judgment of the district court and remanded for further proceedings upon its holding that the express savings clause included in the repealer statute was not to the exclusion of the general savings clause. The court below reasoned that, although the specific savings clause inserted in the repealer law was "altogether unnecessary" if the legislature intended the general savings clause to be read as part of the repealer act, and, further, that even though, "Inadvertence or redundancy should not be assumed" in construing statutes and legislative intent, that "when the alternative is absurdity, the court seeking intent has no real choice." (Appendix B, *infra*, p. B-10)

As rationale for rejecting taxpayer's legal authority and the precedent for the maxim of statutory construction cited by the district court, the court below held that such rules of construction were overridden by its perception of legislative intent. In that regard, the court below found, contrary to the district court, that Congress did not intend to extinguish the tax as evidenced by the *absence* of any mention of the tax in the Drug Control Act itself as well as in its extensive legislative history. As further support for their reasoning that Congress did not intend to extinguish the tax, the Court below found that the *absence* of any mention of this Court's decision in *Leary v. United States*, 395 U.S. 6, 89 S.Ct.

1532, 23 L.Ed.2d 57 (1969), illustrated Congress had "no concern for its impact on the Marihuana Tax Act." (Appendix B, *infra*, at p. B-9).

REASONS FOR GRANTING THE WRIT

1. The holding of the court below is believed to be erroneous and in direct conflict with the well-settled rule of statutory construction as acknowledged by this Court in *Townsend v. Little*, (1883) 109 U.S. 504, 3 S.Ct. 357, L.Ed. 1012. Additionally, the legal reasoning of the decision of the court below in interpreting legislative intent is in direct conflict with the holding of the Fourth Circuit Court of Appeals in *Rybolt v. Jarrett* (4th Cir., 1940) 112 F.2d 642.

In the instant case, the court below denied the force of the familiar statutory construction maxim, *Expressio unius est exclusio alterius*. *Townsend v. Little*, supra, 109 U.S. at 512. The court below, likewise denied the "fair implication that the legislature intended to exclude other exceptions, and thus to make the statute say what it means and mean what it says." *Rybolt v. Jarrett*, supra, p. 645. Instead, the court below undertook an unprecedented approach to interpreting legislative intent. Not having found any objective evidence that the legislature did or did not consider the exclusion of the provision of the general savings clause by the use of the specific savings clause, the court below *assumed* the legislature intended that the general savings clause would survive based solely on the non-existence of any objective evidence of the contrary. This unusual interpretative approach was adopted in an apparent effort to bootstrap a holding which the court below

considered to have been the lesser of two evils and in which they felt they had ". . . no real choice." (Appendix B, *infra* p. B-10).

This Court, in *Great Northern R. Co. v. United States*, 208 U.S. 452, 28 S.Ct. 313, 52 L.Ed. 567 (1908), noted and granted the importance of the consideration of the "elementary rule by which the inclusion of one must be considered as the exclusion of the other", but found sound, objective evidence for its holding that the specific savings clause there involved was to prevent the application of new remedies to the causes then pending and, thus, was not merely addressing matters otherwise provided for in the general savings clause Yet, here, the court below acknowledges that:

> "A comparison of the two savings provisions show that §1103 preserved no proceeding not already saved by §109." (Appendix B, *infra*, at B-5).

Thus, the court below has undertaken the creation of an otherwise unprecedented exception to an accepted rule of statutory construction which is at variance and in conflict with decisions of this Court and decisions of other circuits as well. The basis of the decision in the court below is ill-founded.

2. The decision of the court below is believed to be erroneous for the reason that the legal premise upon which its decision is based is in direct conflict with the practical effect of this Court's decisions in *Leary v. United States*, supra, *Minor v. United States* and *Buie v. United States*, 396 U.S. 87, 90, S.Ct. 284, 24 L.Ed.2d 283 (1969).

Section 1103(a) of the Drug Control Act read:

> "Prosecution for any violation of law occurring

> prior to the effective date of section 1101 (May 1, 1971) shall not be affected by the repeals or amendments made by such section or section 1102, or abated by reason thereof."

This broad language encompassed a myriad of criminal violations, however, the court below, reading this provision in its most narrow sense, considered this as an expression of legislative intent to preserve criminal prosecutions for failure to pay the marihuana tax as provided by 26 U.S.C. §4741. Thus, based upon that premise — and that premise alone — the court below reasoned that its holding that the legislature intended to save the tax liability under the general savings clause was preordained. They reasoned to hold otherwise would ascribe "a ridiculous intent to this enactment." (Appendix B, *infra*, p. B-9).

The court below reasoned that this intent to preserve the tax liability was evidenced by the *absence* of any mention to the contrary in the legislative history and the *absence* of any mention of this Court's decision in *Leary v. United States*, supra. As a result, they ascribe to Congress "No concern for its (Leary case) impact on the Marihuana Tax Act." (Appendix B, *infra*, p. B-9).

To presume and hold that Congress intended and purposed to preserve criminal prosecutions for failure to pay the Marihuana tax is in direct conflict with the real and practical effect of the *Leary* decision. This Court noted the impact of *Leary* on future criminal prosecution for failure to pay the Marihuana Tax in *Buie v. United States*, supra, wherein it was stated:

> ". . . the Fifth Amendment relieves unregistered buyers of any duty to pay the transfer tax and secure the incriminating order form. *Leary v. United States*, 395 U.S. 6, 89, S.Ct. 1532, 23 L.Ed.2d 57 (1969)."

Also, in *Cancino v. United States* (Ct. of Cl., 1971) 451 F.2d 1028, a full discussion of the impact of *Leary* and *Buie* upon future criminal prosecutions for failure to pay the tax in question delineated the constitutional erosion of the criminal aspect of §4741.

Yet, the court below considers that this Court's holdings in *Leary* and *Buie* were ignored by Congress in repealing §4741 and that the impact of Leary was of no concern. Thus, the court below attributes to Congress the futile purpose of preserving a criminal prosecution for failure to pay a tax to which this Court had previously "provided a complete defense." *Cancino v. United States*, supra at 1030.

It is only upon this erroneous and impractical premise that the court below forged its choice of alternatives in which the court below said it had "no real choice."

The lower court's premise attributes to Congress an ignorance of, and to, the decision of this Court. The very act of repealing the Marihuana Tax Act evidences that Congress well knew that the practical effect and impact of *Leary* was to de-vitalize the taxing statute. Removing that questionable alternative of "absurdity" from the lower court's choices would leave them with the choice of finding Congress "inadvertent and redundant" or finding that the Congress intended, by enactment of the special

savings clause, to exclude the provisions of the general savings clause.

In the words of the lower court:

> "Inadvertence or redundancy should not be assumed . . .." (Appendix B, *infra*, at p. 10).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of this Petition has been made by mailing three (3) copies thereof on this 30th day of December, 1977, in an envelope, postage prepaid, properly addressed to each of the following:

Solicitor General
Department of Justice
Washington, D.C. 20530

Scott P. Crampton
Assistant Attorney General
Tax Division
Dept. of Justice
Washington, D.C. 20530

Roy J. True

Roy J. True

APPENDIX A

26 U.S.C. §4741. Imposition of tax.

(a) Rate. — There shall be imposed upon all transfers of marihuana which are required by section 4742 to be carried out in pursuance of written order forms taxes at the following rates:

(1) Tansfers to special taxpayers. — Upon each transfer to any person who has paid the special tax and registered under sections 4751 and 4753, inclusive, $1 per ounce of marihuana or fraction thereof.

(2) Transfers to others. — Upon each transfer to any person who has not paid the special tax and registered under sections 4751 to 4753, inclusive, $100 per ounce of marihuana or fraction thereof.

(b) By whom paid. — Such tax shall be paid by the transferee at the time of securing each order form and shall be in addition to the price of such form. Such transferee shall be liable for the tax imposed by this section but in the event that the transfer is made in violation of section 4742 without an order form and without payment of the transfer tax imposed by this section, the transferor shall also be liable for such tax. Aug. 16, 1954, c. 736, 68A Stat. 560.

* * *

Comprehensive Drug Abuse Prevention and Control Act of 1970. P.L. 91-513. 84 Stat. 1236:

§1103

(a) Prosecutions for any violations of law occurring prior to the effective date of §1101 shall not be affected by the repeals or amendments made by such section of §1102, or abated by reason thereof.

(b) Civil seizures or forfeitures and injunctive proceedings commenced prior to the effective date of §1101 shall not be affected by the repeals or amendments made by such section or §1102, or abated by reason thereof.

* * *

1 U.S.C. §109:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for any enforcement of such penalty, forfeiture, or liability.

APPENDIX B

Jon Alan FREY,
Plaintiff-Appellee,
v.
UNITED STATES of America,
Defendant-Appellant.

No. 75-2871.

United States Court of Appeals,
Fifth Circuit.

Aug. 29, 1977.

Taxpayer brought action to recover payments made pursuant to assessment against taxpayer under Marihuana Tax Act, and Government counterclaimed for unpaid alance of assessment. The United States District Court for the Northern District of Texas, 395 F.Supp. 994, Robert W. Porter, J., granted taxpayer's motion for summary judgment on Government's counterclaim and dismissed case with prejudice, and Government appealed. The Court of Appeals, Clark, Circuit Judge, held that general savings statute was included as part of Comprehensive Drug Abuse Prevention and Control Act of 1970, and thus Government was not precluded from collecting excise tax under Marihuana Tax Act by repeal of latter Act, even though general savings statute made specific saving clause inserted in Comprehensive Drug Abuse Prevention and Control Act of 1970 altogether unnecessary and even though specific savings clause inserted in such Act did not mention tax.

Reversed and remanded.

1. Statute 181(1)

Statutory construction is not a science sufficiently orderly to obey set rules or formulae, but, rather, only pole star in statutory construction is legislative intent.

2. Internal Revenue 136

General savings statute had to be constructed as part of Comprehensive Drug Abuse Prevention and Control Act of 1970, and thus Government was not precluded from collecting excise tax from marihuana transferee under Marihuana Tax Act, which was repealed after taxable event occurred, even though general savings statute made specific savings clause inserted in Comprehensive Act of 1970 altogether unnecessary and even though such Act included special savings clause which expressly saved civil seizures or forfeitures in certain injunctive actions but did not mention tax. 1 U.S.C.A. §109; 26 U.S.C.A. (I.R.C. 1954) §§4741, 4741(a)(2); Comprehensive Drug Abuse Prevention and Control Act of 1970, §§101 et seq., 1103, 21 U.S.C.A. §§801 et seq., 71 note; §1101, 84 Stat. 1236.

Before TUTTLE, GOLDBERG, and CLARK, Circuit Judges.

CLARK, Circuit Judge:

May the government collect an excise tax from a marihuana transferee under a statute which was repealed after the taxable event occurred? The district court answered no, accepting taxpayer's argument that a saving clause in the repealing legislation, which expressly saved civil seizures or forfeitures

and certain injunctive actions but did not mention the tax, prevailed over the general saving statute, 1 U.S.C. §109 (1970). The district court further reasoned that Congress so acted because *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969), had "dealt the [Marihuana Tax Act] a crippling blow" and "washed away its constitutional underpinnings."

The government urges the opposite answer. It contends that a limited saving clause in repealer legislation cannot affect an implied, pro tanto repeal of the general saving statute, which states it would preserve the tax "unless the repealing act shall expressly so provide . . . ." It points out that the district court's construction would attribute to Congress an intent to preserve criminal prosecutions for failure to pay a tax that could not be collected. Finally, the government argues that the district court misconstrued *Leary's* holding as to the constitutionality of the tax involved.

We agree with the district court that *Leary* dealt the Marihuana Tax Act a crippling blow in holding its order form requirement amounted to self-incrimination, but it did not hold the tax to be unconstitutional. More importantly, we hold both parties are correct to the extent that their arguments prove it is impossible to divine a consistent or logical construction of the specific saving clause in the repealing legislation and the general saving statute. At best, we are left with a tension between redundancy and absurdity. Within this limited range of choices, redundancy must be the answer.

The facts are not in dispute. On September 21, 1970,

the taxpayer, Jon Allen Frey, was convicted upon his plea of guilty to violating the laws of the United States regulating the transfer of marihuana and the payment of a federal excise tax thereon. The subject transfer of 208.96 ounces of marihuana occurred during the period from April to May, 1969. Under the provisions of 26 U.S.C. § 4741(a)(2) then in effect, a tax was imposed upon such transfers at the rate of $100 per ounce. The Internal Revenue Service made an assessment against the taxpayer in the amount of $20,900 on August 29, 1969.

On October 27, 1970, the Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L. 91-513, 84 Stat. 1236 (Drug Control Act), was enacted. Certain sections, including §1103 which saved specific pending proceedings, became effective immediately. On March 25, 1971, taxpayer paid $100 of the above assessment and filed a timely refund claim. On May 1, 1971, the remainder of the Drug Control Act became effective. This included §1101 which repealed the Marihuana Tax Act, 26 U.S.C. §4741, *et seq.* Taxpayer paid an additional $1,416.40 of the above assessment on October 6, 1971, and instituted this action to recover both payments. The government denied taxpayer's right to recover and counterclaimed for the unpaid balance of the assessment. The district court granted taxpayer's motion for summary judgment on the government's counterclaim. Taxpayer consented to a dismissal with prejudice of his entire claim for refund and the case was appealed.

Precedent requires that we construe the general saving statute as part of the Drug Control Act, *Great*

Northern Ry. Co. v. United States, 208 U.S. 452, 28 S.Ct. 313, 52 L.Ed.567 (1908); *United States v. Brown*, 429 F.2d 566 (5th Cir. 1970); *United States v. Carter*, 171 F.2d 530 (5th Cir. 1948). However, this does not advance the ball very far in the instant appeal.

The special saving clause of the Drug Control Act read as follows:

> §1103. Pending Proceedings.
>
> (a) Prosecutions for any violation of law occurring prior to the effective date of section 1101 [May 1, 1971] shall not be affected by the repeals or amendments made by such section or section 1102, or abated by reason thereof.
>
> (b) Civil seizures or forfeitures and injunctive proceedings commenced prior to the effective date of section 1101 [May 1, 1971] shall not be affected by the repeals or amendments made by such section or section 1102, or abated for reason thereof.

The incorporation of the general saving statute would add to the Drug Control Act this language:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability * * *. 1 U.S.C. §109.

A comparison of the two saving provisions shows that §1103 preserved no preceeding not already saved by §109.

Taxpayer urges that we resolve the redundancy by

applying the "maxim" of statutory construction that the expression of one thing excludes others not expressed, and thereby limit the rights of action under repealed laws which would be saved to those pending proceedings enumerated in §1103.[1] Taxpayer has constructed this ingenious two-part formulation which he asserts will harmonize existing precedent:

> (A) Where a repealing act contains a special saving clause, the general saving statute (1 U.S.C. §109) does not apply. In such case, the special saving clause applies to the exclusion of the general saving statute.
>
> (B) An exception to Rule (a) above occurs if the purpose of the special saving clause is to save something which would not otherwise be saved by 1 U.S.C. §109. In such a case the special saving clause is a supplement to 1 U.S.C. §109 and both are applicable.

[1] The basic flaw in taxpayer's novel approach is

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[1] Taxpayer's principal precedent for asserting that the Drug Control Act enactment must be construed to displace the general saving statute is *Territory of Alaska v. American Can Co.*, 246 F.2d 493, 17 Alaska 280 (9thCir. 1957), *reversed*, 358 U.S. 224, 79 S.Ct. 274, 3 L.Ed.2d 257 (1959). This case construed a three-section emergency act that repealed all of the Alaska Property Tax Act except municipal, school, and public utility district taxes which had been levied and assessed or would be levied and assessed during the current year. The Court of Appeals found the repealer enactment was intended to override the General Saving Act of Alaska, § 19-1-1 Alaska Compiled Stat. Ann. (1949). Great reliance was placed on the wording in the bill's title "excepting from repeal certain taxes" which referred to the saving clause. The Supreme Court reversed, holding that this construction would conflict with a more reliable indication of legislative intent found in the history of the repealing bill. The government would distinguish this case on the basis that the General Saving Act of Alaska is significantly different from § 109 involved here because it does not include the phrase "unless the repealing Act shall so expressly provide." We need not reach this issue.

that it treats statutory construction as a science sufficiently orderly to obey set rules or formulae. It is not. *See National Railroad Passenger Corp. v. National Association of Railroad Passengers,* 414 U.s. 453, 94 S.Ct. 690, 38 L.Ed.2d 646 (1974). The only pole star is legislative intent. In every case, that star's location must be plotted on the basis of all available information. That this approach applies full force to the coordinated interpretation of repealer legislation, with or without a special saving clause, and an existing separate general saving statute is the lesson taught by the Supreme Court's reversal of the Ninth Circuit in *Territory of Alaska v. American Can Co., supra* n. 1, and by our prior precedent in *United States v. Carter, supra.*

[2] Assuming without deciding that the repeal of §4741 would bar the collection of the remainder of an excise tax which was imposed on a specific transaction that was complete before repeal, assessed in full before repeal, and partially paid before repeal; we find persuasive evidence that Congress did not intend that result in this case. Neither the Drug Control Act itself nor its extensive legislative history[2] mention an intent to extinguish tax liabilities previously incurred under §4741. The House Report stated the principal purpose of the Drug Control Act thus:

> This legislation is designed to deal in a comprehensive fashion with the growing menace

[2] H.Rep. No. 91-1441, 91st Cong., 2nd Sess. (3 U.S.Cong. and Admin.News 1971, p. 4566); Conf.Rep. No. 91-1603, 91st Cong., 2nd Sess. (3 Cong. and Admin.News 1971, p. 4657).

> of drug abuse in the United States (1) through providing authority for increased efforts in drug abuse prevention and rehabilitation of users, (2) through providing more effective means of law enforcement aspects of drug abuse prevention and control, and (3) by providing for an overall balanced scheme of criminal penalties for offenses involving drugs.[3]

In section-by-section analysis of the bill as enacted, the repealer and saving clauses were respectively described in these words:

> Section 1101. Repeals
>
> This section repeals the provision of existing law which deal with narcotics and/or marihuana and which are presently within the jurisdiction of the Ways and Means Committee. The principal laws repealed are the Harrison Narcotics Act (sections 4701 -4736 of the Internal Revenue Code of 1954), the Marihuana Tax Act (sections 4741-4762 of the 1954 Code), the Narcotic Drugs Import and Export Act (21 U.S.C. 171, 173, 174, 176-184, 185), and the Narcotics Manufacturing Act of 1960 (21 U.S.C. 501-517). Section 1103. Pending proceedings
>
> Subsection (a) of this section provides that prosecutions for any violation of law occurring prior to the effective date of the repealer section (sec. 1101) will not be affected by, or abated by reason of, the repeals or the conforming amendments made by section 1101 or 1102.
>
> Subsection (b) provides that civil seizures or forfeitures and injunctive proceedings commenced prior

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[3] *Id.* at 4567.

to such effective date will not be affected by, or abated by reason of, the repeals or conforming amendments.[4]

Leary was not mentioned. No concern was expressed for its impact on the Marihuana Tax Act.[5] To the contrary, Congress expressly preserved all pending criminal proceedings under this Tax Act, even those which would have been directly affected by *Leary*. Moreover, it did not make repeal of the Marihuana Tax Act effective for seven months after the Drug Control Act was enacted. This highlights the most devastating argument against taxpayer's contention. It would attribute to Congress an implied intent to extinguish a tax liability imposed on a past transaction contrary to the specific negation of such an implication by the general saving statute. It would derive the implication both from and in spite of an express saving clause which preserved criminal prosecutions for failure to pay the extinguished tax. We refuse to ascribe such a ridiculous intent to this enactment. To the contrary, treating the general saving statute as a part of the Drug Control Act, we discern an intention that its liability-saving provision save the incurred, assessed and partially paid tax here.

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[4] *Id.* at 4647.

[5] *Leary* did not hold the Marihuana Tax Act unconstitutional. Rather, it held that a timely and proper assertion of the Fifth Amendment privilege against self-incrimination should have provided *Leary* a complete defense to prosecution under the statute making it unlawful to acquire, transport or conceal untaxed marihuana, 26 U.S.C. §4744. Indeed, the Court found the Marihuana Tax Act was intended merely to impose a very high tax on transfers to nonregistrants and not to prohibit such transfers entirely. The taxing statute, 26 U.S.C. §4741, was not mentioned.

Although we reject taxpayer's proposed rules, they do forcefully demonstrate that the general saving statute made the specific saving clause inserted in the Drug Control Act altogether unnecessary. This suggests a second "maxim" which requires courts to construe an enactment so as to give effect to all its provisions. Here again, the "maxim" must yield to the better view of legislative intent which can be garnered from an overview of the entire situation. Inadvertence or redundancy should not be assumed, but when the alternative is absurdity, the court seeking intent has no real choice.

The judgment appealed from is reversed and the cause is remanded for further proceedings not inconsistent herewith.

REVERSED and REMANDED.

In The United States District Court
For the Northern District of Texas
Dallas Division
Civil Action No. 3-5997-F
Jon Alan FREY
v.
United States of America

MEMORANDUM OPINION

This is a marihuana tax refund case now before the Court on the Plaintiff's Motion for Summary Judgment. I have concluded that the Plaintiff's position is correct and the United States' counterclaim for additional tax is improper because of the repeal of the tax in question. Therefore, summary judgment will be granted.

The Plaintiff, Jon Alan Frey, brought this suit on June 21, 1972, under 28 U.S.C. §1346(a)(1) to recover the marihuana transfer tax imposed by the formerly applicable statute, 26 U.S.C. §4741. As later amended, the sum sought is $1,516.40. The counterclaim alleges that Frey is liable not only for the tax he already has paid, but also for an additional $19,383.60 plus interest.

The tax in question no longer is in effect. Congress repealed it, effective May 1, 1971, following the Supreme Court decision reversing the conviction of Dr. Timothy F. Leary for violation of the Marihuana Tax Act. Leary v. United States, 395 U.S. 6 (1969).

The immediate dispute between the parties is whether either the saving clause in the statute repealing the tax or the general saving statute has the

effect of preserving Mr. Frey's liability, as the government contends, or whether his liability was extinguished by the repeal of the tax, as he contends.

The repeal in question was accomplished by Pub.L. 91-513, 84 Stat. 1292. Section 1103 of that law was the saving clause, which provided:

> (a) Prosecutions for any violation of law occurring prior to the effective date of §1101 shall not be affected by the repeals or amendments made by such section or §1102, or abated by reason thereof.

The general saving statute is found at 1 U.S.C. §109:

> The repeal of any statute shall not have the effect to release or extinguish any . . . liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purposes of sustaining any proper action or prosecution for the enforcement of such . . . liability . . ..

The Plaintiff argues, in short, that because the saving clause in the repealer specifically mentioned civil seizures or forfeitures and injunctive proceedings, but omitted any mention of tax collections, Congress did not intend to save tax matters from the repeal. Furthermore, the Plaintiff has agreed to a denial of his recovery of $1,516.40 provided that the Court grants his summary judgment as to the counterclaim and further that the Court determines he cannot recover the $1,516.40 in the summary judgment proceedings.

The government, on the other hand, emphasizes that

under the general saving statute the liability for tax is not extinguished unless the repealing statute *expressly* so provides. It does not expressly so provide, of course, because it is silent as to taxes.

After a thorough review of the parties' briefs and oral arguments and the cases cited, I concluded that Mr. Frey's tax liability was not saved by either statute, and the government may not prevail on its counterclaim.

A similar question was involved in Territory of Alaska vs. American Can Company, 246 F.2d 493 (9th Cir. 1957), *rev'd on other grounds* 358 U.S. 224 (1959). Judge Lemmon cited the maxim *Expressio unius est exclusio alterius* (Expression of one thing is the exclusion of another) and an early Kansas case, State v. Showers, 34 Kan. 269, 8 P. 478 (1885) in concluding that the specific saving clause there involved qualified and furnished exceptions to the territory's general saving statute.

The federal general saving statute was before the Supreme Court in Great Northern R. Co. v. United States, 208 U.S. 452 (1908). The Court said of the statute, "its provisions cannot justify a disregard of the will of Congress as manifested, either expressly or by necessary implication, in a subsequent enactment." 208 U.S. at 465. Continuing, the Court wrote that the general saving statute must be enforced

> unless, either by express declaration or necessary implication, arising from the terms of the law as a whole, it results that the legislative mind will be set at naught by giving effect to the

provisions of §13 [now 1 U.S.C. §109].

Id.

Although reasonable minds might differ, I conclude that the intent of Congress would be frustrated by invoking the general saving statute and holding that Mr. Frey's tax liability survived the repeal of the Marihuana Tax Act. It appears reasonable to me that Congress, realizing that the Supreme Court in *Leary, supra,* had dealt the tax law a crippling blow, decided to erase it from the statute books while providing that, inter alia, caches of marijuana need not be returned to the persons from whom they had been seized. In none of the cases cited by counsel did the Court find any mention of a situation in which Congress had repealed a statute because the Courts had washed away its constitutional underpinnings. Here, Mr. Frey paid $100 before the effective date of the repeal, and that sum as he now admits, is not recoverable. He paid an additional sum of $1,416.40 which he attempted to recover in this suit on a theory of selective enforcement of the marijuana tax laws, a ground which I have earlier refused to entertain because it was not advanced in his claim filed with the Internal Revenue Service. Let the matter rest there; the government is not entitled to squeeze an extra $19,383.60 under a statute that has been stripped of all vitality by the Supreme Court and repealed by Congress.

I have also considered the government's alternative theory, which in brief is that Mr. Frey, having previously pleaded guilty in this Court to a violation of the criminal portion of the marijuana law (the former 26 U.S.C. §4744(a)(2)), is collaterally estopped

from contending he is not liable for the taxes demanded in the counterclaim. After reviewing the government's cases, I am unpersuaded by its argument.

Robert W. Porter

United States District Judge

April 21, 1975

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3-5997-F

JON ALAN FREY

Vs.

UNITED STATES OF AMERICA

SUPPLEMENTAL MEMORANDUM OPINION

The United States has moved this Court to vacate its memorandum opinion and to reconsider its Motion for Summary Judgment. It has called to my attention two unreported district court cases in which the government has prevailed in similar situations. I have reviewed those opinions, Widdis v. United States, No. F-10-73 Civil (D. Alaska Aug. 19, 1974) and Johnson v. City of Fairfax, No. 381-71-A (E.D. Va. July 7, 1972) as well as the government's brief in support of its Motion, and I am unpersuaded that I should withdraw my opinion and grant summary judgment for the United States. The Motion is denied.

Robert W. Porter
United States District Judge

May 15, 1975

No. 77-944

In the Supreme Court of the United States

OCTOBER TERM, 1977

JON ALAN FREY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

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JON ALAN FREY, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question presented in this federal excise tax case is whether the government may collect the marijuana transfer tax with respect to a taxable event that occurred before the statute (26 U.S.C. 4741) was repealed.

After his plea of guilty, petitioner was convicted of violating the laws of the United States regulating the transfer of marijuana and requiring the payment of a federal excise tax upon such transfers. The transfers of 208.96 ounces of marijuana in question occurred during April and May of 1969. On August 29, 1969, the Internal Revenue Service assessed $20,900 of federal excise taxes against petitioner for such transfers pursuant to 26 U.S.C. 4741(a)(2), which was then still in effect (Pet. App. B-3 to B-4).

After petitioner's claim for refund of partial payment of the assessment was denied, he instituted this refund suit in the United States District Court for the Northern District of Texas. The government counterclaimed for the unpaid balance of the assessment. The district court held that petitioner was not liable for the tax because the marijuana transfer tax provision had been repealed, effective May 1, 1971, by Section 1101(b)(3)(A) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1292 (Pet. App. B-11 to B-16).

The court of appeals unanimously reversed. After examining Congress' understanding of the purpose of the Comprehensive Drug Abuse Prevention and Control Act of 1970 and the language of the general saving statute in 1 U.S.C. 109, it held that petitioner's liability for unpaid marijuana transfer taxes was not extinguished by the repeal of the statute (Pet. App. B-1 to B-10).

1. The court of appeals correctly held that petitioner's liability for the excise tax on his marijuana transfers occurring prior to May 1, 1971, was not extinguished by the repeal of the excise tax statute, effective on that date. As the court properly recognized, the question whether petitioner's 1969 liability for transfer taxes was abated by the 1971 repeal must be determined by reference to the general saving statute, 1 U.S.C. 109. *Great Northern Ry. Co.* v. *United States,* 208 U.S. 452; *United States* v. *Brown,* 429 F. 2d 566 (C.A. 5). See also *Warden* v. *Marrero,* 417 U.S. 653, 660. That statute provides that "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, *unless the repealing Act shall so expressly provide* * * *" (emphasis added).

Here there is nothing in the repealing act itself, its legislative history, or its special saving clause that establishes that Congress intended to extinguish tax

liabilities previously incurred under Section 4741 of the Code. The court of appeals correctly concluded that the general saving statute applies to preserve petitioner's pre-existing tax liability (Pet. App. B-2 to B-3).

Contrary to petitioner's argument (Pet. 5), the fact that Section 1103 of the Drug Control Act of 1970, 84 Stat. 1294, explicitly saved criminal prosecutions, civil seizures, forfeitures, and injunctive proceedings does not show that the repeal of 26 U.S.C. 4741 extinguished all civil tax liability. While the courts have frequently applied the maxim of statutory construction that the expression of one thing excludes others not expressed (*expressio unius est exclusio alterius*) (see, *e.g., Townsend* v. *Little,* 109 U.S. 504; *Rybolt* v. *Jarrett,* 112 F. 2d 642 (C.A. 4)), the express mention of certain limited matters does not necessarily require the exclusion of others. *United States* v. *Carter,* 171 F. 2d 530 (C.A. 5). Moreover, where there is a contrary expression of congressional intent, the maxim has no application. *Alaska* v. *American Can Co.,* 358 U.S. 224; *Passenger Corp.* v. *Passengers Assn.,* 414 U.S. 453, 458. 2A Sutherland, *Statutes and Statutory Construction,* § 47.25 (1973).

Here, as the court of appeals recognized, Congress' preservation of criminal prosecutions for failure to pay the marijuana transfer tax shows that it intended to preserve the civil liability for the tax. To conclude otherwise would attribute to Congress the peculiar intention to continue criminal prosecutions for failure to pay a tax with respect to which it abolished (Pet. App. B-9).

2. Petitioner further contends (Pet. 6-9) that requiring him to pay the marijuana transfer tax would violate his

privilege against compulsory self-incrimination.[1] This Court has rejected similar claims with respect to the wagering excise tax. *Marchetti* v. *United States,* 390 U.S. 39, 44, 61; *Grosso* v. *United States,* 390 U.S. 62, 69-70 n. 7. See also *United States* v. *Sanchez,* 340 U.S. 42; *Simmons* v. *United States,* 476 F. 2d 715 (C.A. 10); *Vasilinda* v. *United States,* 487 F. 2d 24 (C.A. 5); *Cancino* v. *United States,* 451 F. 2d 1028 (Ct. Cl.), certiorari denied, 408 U.S. 925. There is nothing in the marijuana transfer tax that requires a different conclusion.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

FEBRUARY 1978.

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[1] *Leary* v. *United States,* 395 U.S. 6, *Minor* v. *United States,* 396 U.S. 87, and *Buie* v. *United States,* 396 U.S. 87, upon which petitioner relies (Pet. 6-8), are distinguishable. In those cases the privilege against self-incrimination was invoked in criminal proceedings; however, the fact that petitioner could claim the privilege with respect to his dealings in marijuana does not relieve him of the obligation to pay the transfer tax. See *Marchetti* v. *United States,* 390 U.S. 39, 44, 61; *Grosso* v. *United States,* 390 U.S. 62, 69-70 n. 7.

DOJ-1978-02